IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1489

BALZAC BROTHERS, INC., *Appellants,*

v.

WARING PRODUCTS DIVISION DYNAMICS OF AMERICA, *et als., Appellees.*

On Appeal from a Judgment of the United States District Court for the District of Puerto Rico

MOTION TO AFFIRM AND APPELLEES' BRIEF IN SUPPORT THEREOF

ROBERTO ARMSTRONG, JR.
Acting Solicitor General

MIRIAM NAVEIRA DE RODON
Attorney for Defendants Appellees Hon. Flavio Cumpiano, Nicolás Torres Renta, Hon. Ramón Negrón Soto and Hon. José Trías Monge

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

14394-7-76

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MOTION TO AFFIRM

Come now Appellees Judge Cumpiano, of the Superior Court of Puerto Rico, San Juan Part; Nicolás Torres Renta, Marshall of the Superior Court of Puerto Rico, San Juan Part, Hon. Ramón Negrón Soto, Court Administrator and Hon. José Trías Monge, Chief Justice of the Supreme Court of the Commonwealth of Puerto Rico by their undersigned counsel respectfully move this Honorable Court to affirm the

decision of the three-judge Court of the United States District Court of Puerto Rico on the grounds that the issues raised are so insubstantial that a plenary hearing is not warranted.

The Appellant's challenge to the decision on the merits would in effect require the reversal or at least the modification of this Court's teachings in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974); *North Georgia Finishing Co.* v. *Di-Chem*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), and *Carey* v. *Sugar*, — U.S. —, 47 L.Ed.2d 587, 96 S.Ct. — (1976).

WHEREFORE, for the aforegoing reasons, more fully elaborated in the accompanying brief, it is respectfully prayed that the decision below be affirmed without further argument.

San Juan, Puerto Rico, July 14, 1976

ROBERTO ARMSTRONG, JR.
Acting Solicitor General

MIRIAM NAVEIRA DE RODON
Attorney for Defendants Appellees Hon. Flavio Cumpiano, Nicolás Torres Renta, Hon. Ramón Negrón Soto and Hon. José Trías Monge

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APPELLEES' BRIEF IN SUPPORT OF MOTION TO AFFIRM

JURISDICTIONAL STATEMENT

Jurisdiction has been properly invoked under 28 USC section 1253. However, it is respectfully submitted that the issue presented is so insubstantial that the opinion below should be affirmed.

COUNTERSTATEMENT OF THE CASE

This is an action brought in the United States District Court for the District of Puerto Rico under 42 USC Section 1983, by Balzac Brothers, Inc., hereinafter referred to as "Balzac", for a declaratory judgment striking as unconstitutional Rule 56 of Puerto Rico's Rules of Civil Procedure insofar as this rule authorizes the issuance of attachment orders ex-parte, without prior written notice or rehearing in cases where no final judgment has been rendered and for injunctive relief to prevent its enforcement.

The events which led to the filing of this action were as follows. Waring Products Division Dynamics Company of America, hereinafter referred to as "Waring", filed on October 1, 1973, in the Superior Court of Puerto Rico, San Juan Part, an action against Balzac for the collection of money owed in the sum of $9,585.04, for merchandise sold and delivered by Waring to Balzac and not paid for under the terms of the sale. Also filed at the same time was a motion requesting attachment of designated property of Balzac to secure the effectiveness of the judgment that might result from the case. Copies of the complaint and summons, but not of the motion requesting attachment, were served on Balzac on that same date. On October 4, Judge Francisco Espinosa of the Superior Court of Puerto Rico, San Juan Part, following the procedure prescribed by Rule 56, and in strict compliance with the provisions thereof,[1] issued an order authorizing the requested attachment conditioned upon the posting by Waring of a $10,000 bond. On October

[1] As per Stipulation, see Memorandum Conference dated February 8, 1974 (App. p. 1a).

31, 1973, Judge Flavio E. Cumpiano, also of the Superior Court, San Juan Part, accepted the $10,000 bond posted by Waring in compliance with Judge Espinosa's Order of October 4, 1973 and issued an order of attachment of Balzac's property. At the time, Balzac had not yet answered the complaint, although he had entered an appearance in the case requesting an extension of time in which to answer and had served interrogatories upon Waring.

The following day, November 1, 1973, Nicolás Torres Renta, Marshall of the Superior Court, San Juan Part, presented the attachment order to Balzac in the Company's premises and Balzac requested the opportunity to make a cash deposit for the amount mentioned in order to avoid attachment of other business assets. Balzac went to a bank in San Juan accompanied by the Marshall and obtained from said bank a check in the amount of $12,085.04 which he delivered to said official. This check was deposited in the Court in lieu of the attachment of the previously designated property.

On that same date, November 1, 1973, Balzac filed the present action in the federal district court and named as defendants Judge Cumpiano, the marshall, the Court Administrator and the Chief Justice of the Supreme Court of the Commonwealth of Puerto Rico as well as Waring. The "Statement" of the Appellant, apart from its editorial comments, correctly sets forth the history of the litigation.

ARGUMENT

Rule 56 of the Puerto Rico Rules of Civil Procedure Does Not Violate the Due Process Requirements of the Fifth or Fourteenth Amendments of the Constitution of the United States.

At the outset it should be stressed that we are here dealing with a statutory scheme designed to achieve a reasonable equilibrium between the rights of creditor and debtor, while guaranteeing the effectiveness of or compliance with the final judgment that may ultimately be obtained. The crux of Appellant's argument for challenging Rule 56 of the Puerto Rico Rules of Civil Procedure as being inconsistent with constitutional due process is that the attachment procedure established therein permits any judge in any civil action to grant, before judgment has been rendered, ex-parte, without prior notice or hearing, an attachment order and that said Rule does not provide for an immediate post attachment hearing at which plaintiff is required to prove the validity of his cause of action. Appellant relies mainly on this Court's decisions in *North Georgia Finishing Co.* v. *Di-Chem,* 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), *Sniadach* v. *Family Finance Co. of Bay View*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), and *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). However, and before we proceed to analyze Rule 56 in the light of these cases, we would like to point out that Appellant's basic premise—that the ex-parte procedure provided for in Rule 56 does not guarantee against mistaken deprivations and makes impossible the summary determination of the relative rights of the parties and that there is no mechanism in said rule for an immediate post-attachment hearing-is unfounded.

Appellees submit that the judge's role in the ex-parte attachment proceedings under Rule 56 is not merely pro-forma, as Appellant seems to think, but positive and active, for he must consider the interests of all the parties and enter a judgment as substantial justice may require. The Supreme Court of the Commonwealth of Puerto Rico has repeatedly stated that Rule 56 "gives the court discretion to grant or refuse [the petition], to grant them, it fixes certain guides: (1) they must be temporary; (2) they must be intended to secure the effectiveness of the judgment that may be entered in due time; and (3) the *interests of all the parties* must be considered as substantial justice and the circumstances of the case may require." *Freeman* v. *Superior Court*, 92 PRR 1, 25 (1965) and *Piza Blondet* v. *Superior Court*, 0-74-480, February 25, 1975 (App. p. 2a). In *Dominguez Talavera* v. *Superior Court,* 0-73-344, September 12, 1974 (App. p. 10a) it had the opportunity of thoroughly analyzing Rule 56 taking into account this Court's teachings in *Fuentes* and *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), and it found that said Rule violated neither the guaranty of due process of law provided in Article II, Section 7, of the Constitution of the Commonwealth of Puerto Rico or the Fifth Amendment of the Constitution of the United States. It then went on to assert that "[t]he supervision by the judicial power of the attachment proceedings since the inception thereof (Rule 56.1), is the maximum guaranty of correctness and preservation of the debtors rights . . . [t]hese legal provisions facilitate the equilibrium or fair accommodation of the conflicting interests of debtor and creditor".

It should be noted that Appellant stipulated [2] that strict compliance with local Rule 56 had been paid in this case, thus it follows that upon application for the ex-parte attachment order the judge complied with the mandate of Rule 56 and considered the interests of all the parties prior to issuing the same.

We shall now proceed to analyze Rule 56 in the light of this Court's recent decisions pertaining to prejudgment ex-parte attachment procedures. Unlike the procedures found to be unconstitutional in *Sniadach, Fuentes* and *North Georgia,* where no judicial officer participated in the issuance of the garnishment and attachment orders, Rule 56 provides for strict judicial control over their issuance. The Commonwealth of Puerto Rico's Rule 56 is definitely more akin to Louisiana's sequestration statute which was upheld in *Mitchell,* than to those of Georgia, Florida and Pennsylvania which were declared unconstitutional in *North Georgia* and *Fuentes.* Here as in *Mitchell,* although the seizures are carried out without notice and without an opportunity to be heard, the writs are only issuable by a judge, after he carefully ascertains and weighs the interests of all parties and bond is posted Also and of the utmost importance is the fact that both statutes entitle the debtor to a post-seizure hearing. Thus as can be readily seen, both statutes provide ample safeguards against mistaken deprivations as a result of the ex-parte proceedings.

It is in the post-seizure hearing aspect where the Louisiana and Puerto Rico statutes differ slightly. While in the Louisiana statute the debtor is entitled to an immediate hearing after seizure and to dissolu-

[2] See Note 1.

tion the writ absent proof by the creditor of the grounds on which the writ was granted, under Puerto Rico's Rule 56.2 [3] the debtor is entitled to a prompt post seizure hearing in which he can question the whole procedure and reduce to a minimum any unwarranted deprivation of property. The right to this hearing was expressly recognized in *Dominguez Talavera* (App. p. 14a) where regarding Rule 56 the Supreme Court of Puerto Rico specifically stated: "the debtor has a right to a prompt hearing in which he may question the whole procedure and reduce to a minimum his deprivation of property and the time that the same be in custodia legis or in the creditor's possession."

Appellant, instead of availing himself of this expeditious procedure to bring to the attention of the court any legitimate claim concerning the attachment order so that it would be vacated or at least reduced, chose to file the present action in the federal court. He now alleges that he has been unable to locate in the rules the mechanism to invoke an immediate post-attachment hearing. In this he stands alone, his position is diametrically opposed to that of the three-judge court, the Supreme Court of the Commonwealth of Puerto Rico and, of course, the Appellees.

Finally, we would like to discuss the *Carey* v. *Sugar,* — U.S. —, 47 L.Ed.2d 587, 96 S.Ct. — (1976), case which dealt with a New York attachment statute which permitted the issuance of a prejudgment attachment order by a judge upon an ex-parte motion, supported by affidavit and upon the posting of an appropriate bond.

[3] "No provisional remedy shall be granted, modified, set aside, or shall any action be taken thereon without notice to the adverse party and a hearing, except as provided in Rule 56.4 and 56.5."

It further provided that the defendant may discharge the attachment by giving an undertaking or by successfully moving to vacate the attachment. A three-judge court enjoined its enforcement "until and unless a meaningful opportunity to vacate an attachment is provided." This Court directed the three-judge court to abstain in that case, since the New York courts could interpret the statute as providing for an adequate preliminary inquiry into the merits of plaintiff's underlying claim. Like the New York statute discussed in *Carey,* Rule 56 provides for the prejudgment ex-parte issuance by a judge of an attachment order after the posting of an appropriate bond, but unlike New York, the Supreme Court of the Commonwealth of Puerto Rico, in *Freeman, Dominguez Talavera* (App. p. 11a) and *Piza Blondet,* (App. p. 2a) has clearly interpreted that Rule 56 provides for a meaningful post-seizure hearing at which the defendant has the opportunity to vacate the attachment by questioning the whole procedure.

CONCLUSION

> "Due process is not an apocalyptical abstraction that by mere invocation must instill God's fear into the court and paralyze the adversary. As every rule, it must be applied with strict respect to the substantial rights of all of the parties concerned. . .
>
> The due process of law, on prohibiting that a person be deprived of his property by ex-parte action, does not demand a preliminary hearing or a hearing prior to the seizure if said hearing is provided at a subsequent stage and prior to rendering a final judgment." *Dominguez Talavera* (App. p. 15a)

The judgment of the District Court should be affirmed, as the question presented is unsubstantial.

San Juan, Puerto Rico, this 14th day of July, 1976.

ROBERTO ARMSTRONG, JR.
Acting Solicitor General

MIRIAM NAVEIRA DE RODON
Attorney for Defendants Appellees Hon. Flavio Cumpiano, Nicolás Torres Renta, Hon. Ramón Negrón Soto and Hon. José Trías Monge

APPENDIX

APPENDIX

(Filed & Entered Feb. 13, 1974
Clerk, U.S. District Court, San Juan, Puerto Rico)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 910-73

ABIMAEL HERNANDEZ, ET AL, *Plaintiffs*

v.

HON. FRANCISCO ESPINOSA ROBLEDO, ET AL, *Defendants.*

Civil No. 960-73

BALZAC BROTHERS, INC., *Plaintiff*

v.

WARING PRODUCTS DIVISION DYNAMICS COMPANY OF AMERICA, ET AL, *Defendants.*

Memorandum of Conference

The parties, represented by their respective attorneys, met in the Judge's Chambers in relation to this cause. Rights to the presence of the Official Court Reporter were waived.

The plaintiff in Civil 910-73 has five (5) days to amend the complaint to include Metro Realty and Development Corporation. Metro will have five (5) days thereafter to answer.

The parties involved in both captioned complaints have fifteen (15) days to inform the Court whether a stipulation as to the facts will be made. Otherwise, a hearing will be held. The parties have stipulated that strict compliance with local Rule 56 has been paid in this case.

Finally, the parties have thirty (30) days to file simultaneous memoranda of law on all issues of law herein present.

IT IS SO ORDERED.

San Juan, Puerto Rico, February 8, 1974.

/s/ JOSE V. TOLEDO
Jose V. Toledo
Chief Judge

IN THE SUPREME COURT OF PUERTO RICO

No. O-74-480

Certiorari

JUAN PIZÁ BLONDET and WILSON BUILDING CORPORATION,
Petitioners

v.

SUPERIOR COURT OF PUERTO RICO, SAN JUAN PART,
MIGUEL GIMÉNEZ MUÑOZ, Judge, *Respondent*
SALVADOR JIMÉNEZ GUEVARA, *Intervener*

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, February 25, 1975

The complaint filed by Jiménez Guevara against Pizá Blondet, entitled on: nonperformance of contract, requests two alternative remedies: specific performance, or a judgment ordering the payment of an obligation for the amount of $270,000 plus $200,000 indemnity for damages derived from nonperformance of contract, $25,000 for attorney's fees and costs. Jiménez grounds his cause of action on a contract whose seventh clause provides:

"—SEVEN: Pizá and/or Wilson bind themselves and agree to pay Jiménez and/or Professional, or the corporation designated by Jiménez, the credit for the sum of Two

HUNDRED AND SEVENTY THOUSAND DOLLARS ($270,000.00) mentioned in clause number FIVE of this contract, in the following manner:

1—Pizá and/or Wilson shall transfer to a corporation, to be incorporated, a lot of 22,000 or 22,500 square meters located in Isla Verde, Puerto Rico.

2—Fifty percent (50%) of the shares of the corporation mentioned in the foregoing paragraph shall be sold to Jiménez for a price equivalent to 50% of the market value of the lot mentioned in the foregoing paragraph. The market value of the aforementioned lot shall be determined through assessment by Mr. Ferdinand Acevedo, said assessment shall be submitted to Mr. Pizá within a term of thirty (30) days as of the date of this contract.

3—The value of the shares as determined according to the foregoing paragraph, shall be paid by Jiménez in the following manner:

a) $270,000.00 through the total and final cancellation and release of the credit in his favor mentioned in clause number FIVE of this contract. In other words, the sum of $270,000.00 shall be credited to Jiménez at the total purchase price of the shares; and

b) the remaining purchase price of the shares shall be paid by Jiménez in two (2) annual payments, starting as of the date when said transaction is performed or the shares in favor of Jiménez are issued, any of the said events which takes place first. The deferred balance shall accrue interest at the annual rate of seven percent (7%), to be paid quarterly.

c) the sum of $270,000.00 which is now owed to Jiménez and any increase that the said amount may have as a result of pending readjustments, shall accrue interest at the rate of 7% to be paid quarterly until the selling price of the property mentioned in clause number SEVEN, Sub-paragraph 1 is credited.

4—Jiménez shall assume the payment of 50% of the total interest accrued by the mortgage for the principal sum of $930,000.00 which now encumbers the lot mentioned in paragraph 1 of this clause. Providing further, that said obligation shall cover the interest accrued as of the first day of January 1971, provided the payment of the shares, as stipulated in paragraph 2 of this clause, be issued in favor of Jiménez within the next ninety (90) days as of the date of this contract. Providing also, that said obligation sha!l also be subject to the eventuality that within the aforementioned term of ninety (90) days Pizá and/or Wilson shall transfer the lot of 22,000 or 22,500 square meters mentioned in paragraph 1 to the corporation which shall be created as agreed in the said paragraph 1.

—The sale of the shares shall take place within the term of sixty (60) days as of the date of this contract."

To secure the effectiveness of the judgment plaintiff Jiménez, intervener herein, obtained an order instructing the Registrar of Property to enter a notice of lis pendens with regard to the real property in question, which was finally identified as a parcel of land of 22,548.125 square meters located in Cangrejos Arriba, Carolina; and also prohibiting defendant Pizá from alienating or encumbering said property. The trial court refused to allow a bond from the defendant to free himself from the serious restriction over his ownership right, and he resorts to this Court with the urgency of someone whose property is encumbered for nearly a million dollars and all undertakings paralyzed for a year and a half. We issued an order to show cause why the order appealed from should not be set aside and defendant's bond allowed, and the briefs of the parties have reaffirmed our original opinion.

Rule 56 of the Rules of Civil Procedure is prolific in its provision of remedies to secure the effectiveness of the judgment, it does not curtail the conventional remedies and on the contrary comprises without enumerating "any other

measure which it [the court] may deem advisable, according to the circumstances of the case." *Suárez* v. *Superior Court*, 85 P.R.R. 522, 527 (1962). In its scope it corresponds to a procedural design in whose execution the court shall consider the interests of all the parties, statements anticipated by the severe scrutiny revealing constitutional invalidity in analogous statutes in other jurisdictions. *Sniadach* v. *Family Finance Corporation of Bay View*, 395 U.S. 337; *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Domínguez Talavera* v. *Superior Court*, 102 P.R.R. — (1974); North *Georgia Finishing Inc.* v. *Di-Chem Inc.*, — U.S. — (opinion of January 22, 1975-43 LW 4192); *Mitchell* v. *Grant*, 40 L.Ed.2d 406 (1974).

The remedy to secure the effectiveness of the judgment granted in this case was dual, and in view of the circumstances of the case, burdensome and confiscatory. The defendant, petitioner herein, was precluded from alienating a very valuable property and the Registrar of the Property was simultaneously ordered to enter a notice of lis pendens, thus withdrawing from business a real property of great value and quashing the proprietor's ownership right and his power to enter freely into a contract; said owner, restrained by the judicial order, runs the risk of losing his property encumbered as it is by a substantial mortgage credit.

Considering the serious consequences which the remedy prohibiting the alienation as well as that of receivership have on the defendant's freedom to do business and particularly their destructive effect on denfendant's economy, they should be unavoidably and necessarily justified. No order can be issued on the prohibition to alienate to secure the effectiveness of the judgment, if the allegations of the complaint themselves fail to state the cause of action for which the effectiveness of the judgment is requested and evidently show that plaintiff cannot obtain judgment against the defendant. *Armstrong & Co.* v. *Irizarry*, 29

P.R.R. 563; *Mercedes Bus Line, Inc.* v. *Rojas,* 70 P.R.R. 513, 518; *Gastón* v. *Heirs of Franceschi,* 13 P.R.R. 293, 294. Judicial judgments are rendered over real controversies where the decision of the court at the moment of the execution, shall not stumble against the perplexity of intangible and unrealized projects.

In this case the prohibition to alienate was requested and obtained under the premise that plaintiff-intervener is entitled to request specific performance of the contract consisting in the delivery of the specific thing regulated by Art. 1049 of the Civil Code (31 L.P.P.A. § 3013).[1] The trial court erred. The aforecopied clause number seven of the contract provided that the lot in Isla Verde, the real property whose delivery is claimed by plaintiff, shall not be transferred to the latter, but to a corporation *to be organized* where plaintiff Jiménez would only hold half of the shares, for the payment of which and considering the value of the property, the $270,000 of the credit against Pizá which he would credit to the price would not suffice, but he would have to pay a balance to complete 50% of the market value of the lot in a term of two years and accruing interest at the annual rate of 7%. It is evident that the thing, the delivery of which is claimed by plaintiff is not now, nor would ever be his, under any circumstances whatsoever, since the contract limited his interest therein to 50%. Even under the ideal conditions of a feasible

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[1] Article 1049 of the Civil Code

"Should the thing delivered be a specified one, the creditor, independently of the right granted him by section [3018 of this title], may compel the debtor to make the delivery.

"Should the thing be undetermined or generic he may ask that the obligation be fulfilled at the expense of the debtor.

"Should the person obligated be in default, or be bound to deliver the same thing to two or more different persons, he shall be liable therefor with regard to unforeseen events until the delivery is made."

specific performance his right to an order forbidding defendant from alienating and encumbering the other half of the real property represented by 50% of the corporate stock that he would always hold, is questionable.

But the agreement to transfer the property to a corporation which did not exist at the moment of the contract is not subject to performance imposed or ordered by the court. The body corporate is a juridical person subject to specific regulation by the Corporation Law (14 L.P.R.A. § 1101 *et seq.*), which defines it as composed of not less than three persons (Art. 101) who shall sign a certificate of incorporation containing the name and domicile of each of the incorporators, purposes, class, and value of the shares, and the life-span if it shall not have perpetual existence; rules for the management of the business and preemptive right of the stockholders to acquire the different types of stock; determination of the vote in proportion of the shares for any corporate action and number of stockholders as decided by the incorporators (Art. 102); by-laws for internal regulation (Art. 109) and oath of all the incorporators and the filing of the certificate of incorporation in the Department of State (Art. 103). Only after the execution, filing, and recording of the certificate of incorporation as provided by Art. 103, and after the paying of any tax required by law, shall the body corporate be constituted by the persons so associated and it shall start then its corporate existence (Art. 106). What names of incorporators, conditions, and terms of incorporation required by the foregoing articles of the Corporation Law are contained in the contract under our consideration so that the court may at least ask any person his willingness to organize the corporation to which the title over the real property shall be transferred?[2] Who

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[2] The illegality and practical impossibility of a performance of contract imposed through judgment is emphasized in the same prayer of the complaint when it says: ". . . and if the defendants

can be obliged to integrate the corporation, essential element of the agreement formulated in the seventh clause? On a previous occasion this Court contemplated the possibility to the effect that a specific performance shall not be required in an agreement to form a corporation for the following reasons: ". . . that the terms of the contract were not sufficiently certain and definite . . .; that court of equity will not render a decree which requires protracted supervision . . .; that a court of equity has no power to control by its decree of specific performance the discretion of administrative officers from whom under state law a permit for the issuance of stock has to be procured . . .; that the complaint calls for the performance of acts which require the participation of others not parties to the contract or suit . . .; that the court has no power to compel a nonexistent corporation to issue and distribute stock in a specified manner . . .; that the court has no power to compel a corporation to elect specified persons as officers thereof . . .; that it might be impossible for the defendant to find the requisite number of incorporators . . .; that at the time of the suit, the parties were hostile and unfriendly . . .; that three of the four proposed incorporators were insolvent . . .; that the plaintiff's promise to render services to the projected corporation was not susceptible of specific performance." *Vázquez* v. *Sup. Ct.; San Miguel y Cía. Int.*, 78 P.R.R. 707, 715 (1955).

The fact that the civil action "affects the title or ownership right" of the lot in Isla Verde to such a degree that it gains access to the Registry of Property as a notice of lis pendens under Art. 91 of the Code of Civil Procedure,

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refuse, we pray the court to order the Marshal to attach those documents as are necessary to perform the contract." It would be a nightmare more than a juridical aberration for any Marshal to execute the judgment undertaking the task of recruiting incorporators, organizing a board of directors, issuing stocks, and forcing them to accept the by-laws, everything under coercion.

depends entirely on the fact that the contract in question be subject to specific performance. It having been established that it is not, the only thing subsisting in the intervener's complaint is a claim for the recovery of money and damages which because of its personal nature is not comprised in the ambit of the aforecited Art. 91 of the Code of Civil Procedure. *Martínez de León* v. *Registrar of Property*, 101 P.R.R. — (1973). The only thing left for plaintiff is the classical remedy of attachment of property to which he limited his original petition to secure the effectiveness of the judgment of August 14, 1973 and which he abandoned when the court required a $400,000 bond through an order of August 28, 1973. The defendant and petitioner herein shall be entitled to guarantee the attachment under this his sole provisional remedy. Rule 56.3 of the Rules of Civil Procedure.

The writ will be issued and judgment rendered setting aside all the actions and orders of the trial court prohibiting the defendant-appellant from alienating or encumbering the property in question and ordering a notice of lis pendens; the proceedings consistent with this opinion shall be continued in the Superior Court and the order from which appeal is taken of October 30, 1974 will be set aside.

CHIEF CLERK'S CERTIFICATE

I, Angel G. Hermida, Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the foregoing is a true and faithful photostatic copy of the official translation from Spanish into English (said official translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by the Supreme Court of Puerto Rico on February 25, 1975, in the above-entitled case, (0-74-480) the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF, and at the request of the Office of the Solicitor General of Puerto Rico, I issue these presents

for official use, free of charge, under my hand and the seal of this Court, in San Juan, Puerto Rico, this 5th day of March 1975.

/s/ A. Hermida
Angel G. Hermida
Chief Clerk
Supreme Court of Puerto Rico

[SEAL]

IN THE SUPREME COURT OF PUERTO RICO

No. 0-73-344

Certiorari

Ricardo Domínguez Talavera, *Petitioner,*

v.

Superior Court of Puerto Rico, San Juan Part,
(Hon.) Osvaldo de la Luz Vélez, Judge, *Respondent,*

The Chase Manhattan Bank, *Intervener.*

Judgment

San Juan, Puerto Rico, September 12, 1974

For the reasons stated in the foregoing Opinion, the writ issued is vacated and the case remanded to the trial court for further proceedings consistent with this opinion.

It was so ordered and decreed by the Court as witness the signature of the Secretary.

Angel S. Hermida
Secretary

IN THE SUPREME COURT OF PUERTO RICO

No. 0-73-344

Certiorari

Ricardo Domínguez Talavera, *Petitioner,*

v.

Superior Court of Puerto Rico, San Juan Part,
Hon. Osvaldo de la Luz Vélez, Judge, *Respondent,*

The Chase Manhattan Bank, *Intervenor.*

Mr. Justice Díaz Cruz delivered the Opinion of the Court
San Juan, Puerto Rico, September 12, 1974

The Chase Manhattan Bank, assignee of a conditional sale contract on a Volkswagen automobile, brought repossession proceedings against petitioner Domínguez to recover a balance of $299.42 of installments due and, as a temporary measure to secure the effectiveness of a judgment, it requested and obtained a writ of attachment on the vehicle, issued by a Superior Court Judge and conditioned to a prior posting of a $1000 bond by the creditor bank on behalf of its debtor, to secure for him "all the damages that may be caused to him by reason of the attachment."[1] When the Marshal executed the attachment order he cited the debtor to an "oral hearing" (a hearing provided by the Conditional Sales Act (10 L.P.R.A., Section 36)) to be held 14 days after repossession of the vehicle.[2] The defendant Domínguez impugned the seizure as being against the due process, on the basis that he was not

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[1] The Chase followed simultaneously the procedure of citation and hearing provided by Section 6 of the Conditional Sales Act. (10 L.P.R.A. Section 36).

[2] Said hearing was suspended on motion of the debtor, petitioner here, and held on May 3, 1973, when the motion on nullity of attachment, on the basis of *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) for having been issued by virtue of an ex parte order, was decided.

heard prior to the issuance of the order that deprived him of possession of his Volkswagen. The decision of the Court denying the motion is proper at law.

The repossession of movable property subject to a conditional sales contract, authorized by Section 6 of the Conditional Sales Act (10 L.P.R.A. Section 36) and the attachment to secure the effectiveness of a judgment pursuant to Rule 56 of the Civil Procedure do not violate the guaranty of the due process of law provided in Article II, Section 7, of the Commonwealth of Puerto Rico Constitution and in the Fifth Amendment to the U.S. Constitution. The decision in *Fuentes* v. *Shevin,* 407 US 67 (1972), whereon the debtor-petitioner grounds his petition, was given against a legal and factual background not present in this case. The subsequent decision in *Mitchell* v. *Grant,* — U.S. — (May 13, 1974), took care of making it rather clear that the anathema of *Fuentes* was directed chiefly to the repossession and attachment statutes that confer excessive power to private litigants without the full participation of a judge; to the abdication by the State of control and supervision over procedures since the inception thereof. Though that was the situation in Florida which provoked the rejection in *Fuentes,* it is not so in Puerto Rico. In respect to repossessions pursuant to the Conditional Sales Act, the buyer in arrear has opportunity of notice and hearing prior to be deprived of his property. To such effect, Section 6 of said Act (10 L.P.R.A. Section 36) provides insofar as pertinent: Provided, That to enable the conditional vendor to recover de movable goods or chattels, the object of the contract, for retention during the aforesaid term of thirty (30) days, he shall file with the judge of such court as may have jurisdiction in the case, an affidavit showing that the conditional vendee has failed to observe the terms of the contract of sale and that the claim is made in good faith, and he shall attach to such affidavit a copy of the contract of conditional sale, containing a statement of its registration in the Conditional Sales Register established by sections 31-41 of this title. Upon receipt by the judge of the affidavit and of the copy of the contract, he shall cite the parties concerned to a hearing which shall be held within the ten days following the date of the citation, and after having called them orally to hear the case, if he deems the buyer has failed to comply with the condition, he shall issue an order directing the marshal to seize the claimed property which the marshal shall deliver to the conditional vendor, subject to the provisions of sections 31-41 of this title. This is possible because in Puerto Rico, contrary to other jurisdictions, the mentioned statute, on creating a lien entered in the ad hoc register, protects the vendor against transfer of the object to third parties (10 L.P.R.A. Section 34); *Smallwood* v. *Court,* 50 PRR 608.

At the same time Rule 56 of the Civil Procedure satisfies the exigencies of due process achieving a reasonable equilibrium between the rights of creditor and debtor, since it exempts the prior notice and hearing on request for attachment as temporary remedy only in the case governed by Rule 56.4 which, in regards to movable property, provides: "If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex parte of a claimant, an order of attachment or of prohibitions to alienate . . . . In the case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility." Let it be noticed that even if the ex parte attachment is authorized, Rule 56.3 demands a bond from the claimant or documental evidence demonstrative of the legality of his claim and, on the other hand, it grants defendant the right to dissolve the writ and retain the property by posting a bond.[3]

[3] Rule 56.3 Bond

"A temporary remedy may be granted without giving a bond if it appears from public or private documents signed

The supervision by the judicial power of the attachment proceeding since the inception thereof (Rule 56.1), is the maximum guaranty of correctness and preservation of the debtor's rights as expressed in its final sentence: "In every case in which a temporary remedy is sought, the court shall consider the interests of all the parties and shall enter judgment as substantial justice may require." These legal provisions facilitate the equilibrium or fair constitutional accommodation of the conflicting interests of debtor and creditor. The solution molded into our legislation extends the due process to both parties: (a) by granting a temporary remedy that preserves the integrity of the chattels, generally the only guarantee that counts, from the continuous erosion and decline in economic value through the use thereof by the buyer; (b) it prevents the destruction, transfer or concealing of the chattels by an unconscionable debtor which could very well be his only reaction if previously warned that the purpose exists of repossessing the property; (c) the requirement of bond or the alternative of documented authenticity of the attachment request, establishing a probability that plaintiff shall prevail, with the indispensable intervention of the court, minimizing the risk that a wrongful writ be issued; and (d) the debtor has a right to a prompt hearing in which he may question the whole procedure and reduce to a minimum his deprivation of property and the time that the same be in custodia legis or in the creditor's possession. *Mitchell* v. *Grant*, — U.S. — (May

before a person with authority to administer oaths that the obligation may be legally enforced, or if a remedy is sought after judgment is entered. In all other cases the court shall require a bond sufficient to secure all the damages caused to the defendant by reason of the remedy. A defendant or respondent may, however, retain the possession of the personal property attached by the plaintiff or claimant by posting a bond in such sum as the court may deem sufficient to secure the value of the property. The guaranteeing by the defendant of the sum attached shall render the attachment ineffective."

13, 1974). Besides that stated, the strident constitutional claim founded on the severity of the property deprivation that the debtor-appellant alleges to have suffered, loses urgency and persuasive vigor when a prompt hearing is granted him and he asks for suspension.

The due process of law, on prohibiting that a person be deprived of his personal property by ex parte action, does not demand a preliminary hearing or a hearing prior to the seizure if said hearing is provided at a subsequent stage and prior to rendering a final adjudgment. *Mitchell*, cited. Rule 56 of the Civil Procedure offers due protection to the debtor's interest as well to that of his creditor, which are manifested when one wants to retain and the other to obtain the possession of the attached vehicle.

The due process is not an apocalyptical abstraction that by mere invocation must instill God's fear into the court and paralyze the adversary. As every rule, it must be applied with strict respect for the substantial rights of all the parties concerned.[4] *The Supreme Court has said that its nature is circumstantial and pragmatic.*

The writ issued shall be vacated and the case remanded to the trial court for further proceedings consistent with this opinion.

/s/ Jorge Díaz Cruz
Justice

[4] *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Stanley* v. *Illinois*, 405 U.S. 645, 650 (1972); *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945).